HO YUI LUEN & ANOR v. AGILE PJD DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN J
[WRIT OF SUMMONS NO: WA-22C-10-01-2022]
5 MARCH 2025

Abstract – *There is a duty of care imposed on a developer to ensure that damages suffered by homebuyers are avoided. A parcel in a luxurious condominium which has numerous defects and incomplete finishing work that is yet to be remedied properly, rendering the parcel uninhabitable, underscores a fundamental failure in the quality of materials and workmanship, and the developer's failure to comply with the terms of a sale and purchase agreement. In such scenario, the homebuyer is entitled to be awarded special, general and exemplary damages.*

LAND LAW: *Housing developers – Sale and purchase agreement ('SPA') – Parties bound by terms contained in SPA – Significant defects identified – Questionable quality of materials and workmanship – Whether demonstrated developer's failure to construct parcel in good and workmanlike manner – Whether parcel fit for human habitation – Delivery of vacant possession – Whether delayed – Whether legal vacant possession only deemed to have been delivered until defects remedied in full – Whether there was breach of duty of care and contract – Whether special, general and exemplary damages awarded – Housing Development (Control and Licensing) Act 1966 – Housing Development (Control and Licensing) Regulations 1989*

CONTRACT: *Sale and purchase agreement ('SPA') – Housing developers and homebuyers – Parties bound by terms contained in SPA – Significant defects identified – Questionable quality of materials and workmanship – Whether demonstrated developer's failure to construct parcel in good and workmanlike manner – Whether parcel fit for human habitation – Delivery of vacant possession – Whether delayed – Whether legal vacant possession only deemed to have been delivered until defects remedied in full – Whether there was breach of duty of care and contract – Whether special, general and exemplary damages awarded – Housing Development (Control and Licensing) Act 1966 – Housing Development (Control and Licensing) Regulations 1989*

The plaintiffs purchased a luxurious condominium known as the Agile Mont Kiara project ('project') from the defendant, the developer of the project. The plaintiff, on 27 November 2016, had remitted a deposit payment *via* cheque to the defendant to secure a unit of the project ('parcel'). Thereafter, on 21 December 2016, the plaintiffs made the first payment of RM53,256 and executed a sale and purchase agreement ('SPA') to purchase the parcel for the

total purchase price of RM2,662,800. Under the terms of the SPA, liquidated ascertained damages ('LAD') were payable at 10% of the purchase price, amounting to RM729.54 per day for any delay. After four years, the defendant was prepared to deliver vacant possession to the plaintiffs, attaching the notice of delivery of vacant possession dated 25 December 2020. On 29 December 2020, the plaintiffs acknowledged receipt of the notice of delivery of vacant possession. Subsequently, the plaintiffs took the keys to the parcel and conducted an inspection of the parcel on 4 February 2021. It was then that the plaintiffs alleged that they discovered that the parcel was filled with severe defects rendering it unfit for occupation. As a result, the plaintiffs were unable to move into the parcel and submitted the initial defect forms to the defendant, requesting rectification of the defects. The defendant thereafter carried out rectifications in the parcel as well as over the rooftop of the parcel. Throughout this period, the plaintiffs alleged that the parcel remained unfit for occupation due to the ongoing rectification works. As time progressed, the plaintiffs continued to file additional defect forms, and rectification works had been ongoing throughout this period. On the belief that the defendant was close to rectifying the defects and to mitigate their losses, the plaintiffs moved into the parcel on 6 November 2021. The plaintiffs submitted that the defects remained unresolved and, in some instances, recurred and they continued to experience significant problems, including persistent water leakages and structural cracks, which had further impacted their ability to enjoy the parcel. The plaintiffs pleaded that the defendant's promotion of the project as a luxury condominium created a legitimate expectation that the parcel would meet standards commensurate with such classification. Thus, the plaintiffs contended that the defendant also ought to have exercised reasonable care and skill in the construction and design of the parcel and ensuring that the contractors executed the works in a good and workmanlike manner. The defendant, however, submitted that it had, *inter alia*, delivered vacant possession notice to the plaintiffs together with, amongst others, the completion and compliance certificate ('CCC') certifying that the parcel was safe and fit to be occupied.

Held (ordering accordingly):

(1) The plaintiffs and the defendant were bound by the express terms contained in the SPA which SPA shall conform to the statutory Schedule H sale and purchase agreement under the Housing Development (Control and Licensing) Act 1966 ('HDA'). This court subscribed and held on to the three-fold implied terms principle, *ie*, the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation which should necessarily be implied in within the SPA entered into between the plaintiffs and the defendant in the sale and purchase of the said parcel. (paras 21 & 23)

(2) The defects listed still persisted on the day of the court's site visit to the parcel. It was observed that the dampness was sufficiently visible to the naked eye and sufficiently serious so as to cause the plaintiffs to be in a position, to wit, the parcel uninhabitable and more so when the said parcel was supposed to be a high-end condominium. The defects identified, in particular water leakages, constituted a significant defect within the parcel and were severe and significant, and demonstrated the defendant's failure to construct the parcel in a good and workmanlike manner as required under cl. 14 of the SPA. (paras 32 & 43)

(3) The defects were found to be pre-existing and inherent and that the parcel was not constructed using good materials nor in a workmanlike manner, as expressly required under the terms of the SPA. There was a breach of the express terms in cl. 14 of the SPA with regards to the materials, and workmanship to the said parcel and/or that the parcel was not constructed in a good and workmanlike manner and/or the implied terms that the defendant/developer had failed to do its work in a good and workmanlike manner and/or that it would supply good and proper materials; and that the parcel would be reasonably fit for human habitation. (paras 47 & 48)

(4) The defendant had issued a vacant possession notice by way of the notice of delivery of vacant possession dated 25 December 2020 to the plaintiff together with amongst others, the CCC dated 31 December 2019, certifying that the parcel was safe and fit to be occupied. In the notice of delivery of vacant possession, it was expressly stated therein that vacant possession would be deemed to have been given 30 days from the date specified in the said notice of delivery of vacant possession '... whether or not you have entered into possession or occupation of the abovesaid property ... pursuant to cl. 27 of the SPA'. The plaintiffs had subsequently acknowledged receipt of the vacant possession notice/notice of delivery of vacant possession on 29 December 2020. The plaintiffs thereafter only collected the keys from the defendant on 4 February 2021 and inspected the parcel on the same day, after which the plaintiffs immediately lodged a defect checklist with regards numerous defects to the defendant and a further defect checklist dated 15 February 2021 for other defects was then also given to the defendant. Therefore, the plaintiffs were deemed to have taken possession of the parcel on or around 29 December 2020. (paras 50-53)

(5) An extension of time was purportedly granted by the Housing Controller in accordance with reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('HDR') for an extension of time for delivery of vacant possession from 36 months to 48 months. Thus, based on the case of *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd*

& Other Appeals, the extension of time to the said 48 months period granted by the controller were both valid and legal as the controller had, at that material time, the authority to waive or amend the terms of the Schedule H of the SPA. Thus, the time for the delivery of vacant possession was the period of 48 months. (paras 55-59)

(6) The SPA validly contained a period of 48 months for delivery of vacant possession. It was the duty of the defendant to deliver vacant possession on or before 1 December 2020, *ie*, a total of 48 months from 2 December 2016 which was the date of the entry into the SPA, premised on when the deposit of RM53,256 was only paid and was evidenced by the temporary receipt issued dated 2 December 2016. The plaintiffs had acknowledged the notice of delivery of vacant possession and there was nothing to show that they had reserved their rights to claim otherwise. (paras 65-67)

(7) Clause 27 did not support the contention of the plaintiffs that legal vacant possession should not be deemed to have been delivered by the defendant until the defects were remedied in full as cl. 27 only stated that the developer shall let the purchaser into possession of the said parcel upon, *inter alia*, the issuance of a CCC. It was clear herein that the CCC had been issued on 31 December 2019 and that the CCC had accompanied the said notice of delivery of vacant possession. There was no denial of the CCC being issued or a challenge by the plaintiffs to the said CCC in the plaintiffs' pleadings. Based on the evidence of the defect checklist, the alleged defects at the material time were mostly minor in nature. The evidence of the state of the parcel at the time of the delivery of vacant possession, *ie*, 29 December 2020, had not been proven to be unfit and unsafe for occupation. Therefore, the defendant had duly complied with cl. 27 of the SPA. (paras 68-73)

(8) The parcel had numerous defects, including, but not limited to dampness, water leaks, water ingress, waterproofing system failure of, wall cracks, flooring issues, and incomplete finishing work which to-date are yet to be remedied properly, and subsequent rectification works undertaken by the defendant, rendering the parcel uninhabitable. This underscored a fundamental failure in the quality of materials and workmanship and the maxim of '*res ipsa loquitor*' would apply in such a case. The defendant had failed to comply with the implied terms, including but not limited to the obligation and a duty to construct the parcel to a standard befitting and expected of a luxury condominium that was functionally consistent with such a standard. This also imposed a duty of care on the defendant as a developer to ensure that the damages suffered by the plaintiffs as house buyers were avoided. Such damages would not have occurred to the plaintiffs if proper care had been taken, and the plaintiffs would then not be placed in the position that they have had to endure. (paras 75-78)

(9) There have been some delays in addressing the defects which were without valid justification and these delays had aggravated or exacerbated the damages to the parcel. The defendant had negligently failed to carry out the rectification works properly and/or diligently. It is standard practice to engage qualified experts to conduct thorough inspections using specialised equipment and instruments to identify water leakages not visible to the naked eye, but this was not done. The defendant had failed to follow the standard practice of carrying out the rectification works properly and/or diligently. (paras 81-84)

(10) As for damages, there had been a slight delay in the delivery of vacant possession and as such the plaintiffs' claim for LAD would be allowed. The time period should be from 1 December 2020 to 29 December 2020 (RM729.53 x 28 days) which amounted to RM20,426.84 to be awarded to the plaintiff. The plaintiff was also awarded special damages because there had been a breach of contract and/or breach of duty of care to ensure that the parcel was constructed in a good and workmanlike manner as well as a breach of the duty to supply good and proper materials; and that the parcel would be reasonably fit for human habitation. As the plaintiffs had been deprived of enjoying the entire property at all material times, this court granted a sum of RM200,000 as general damages for the inconvenience, mental grievance, distress and discomfort suffered by the plaintiffs. Exemplary damages of RM100,000 were also awarded to the plaintiffs as the defendant's conduct was rather lackadaisical and not in conformity with the standards required in its construction of the parcel and the rectification of the defects. (paras 87-101)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumhan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Dua Residency Management Corporation v. Edisi Utama Sdn Bhd & Anor [2021] CLJU 174; [2021] 1 LNS 174 HC ***(refd)***

Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v. Keris Properties (PK) Sdn Bhd (No 1) [2009] 5 MLJ 381 ***(refd)***

Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd [2003] 1 MLJ 22 ***(refd)***

Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(refd)***

Lee Shy Tsong & Ors v. Amprojek Construction Sdn Bhd [2018] CLJU 2088; [2018] 1 LNS 2088 HC ***(refd)***

Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal [2020] 7 CLJ 720 CA ***(refd)***

MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals [1995] 2 CLJ 912 CA ***(refd)***

Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals [2024] 8 CLJ 519 FC ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***
Remeggious Krishnan v. SKS Southern Sdn Bhd [2023] 4 CLJ 36 FC ***(refd)***
Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors [2019] 2 CLJ 261 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74(1)
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), (3)

For the plantiff - San Peggy, Chin Yu Yen & Lee Yen Jia; M/s San & Co
For the defendant - Lee Pay Wen & Vivian Than On Yee; M/s Ricky Tan & Co

Reported by Suhainah Wahiduddin

JUDGMENT
(Encl. 1)

Nadzarin Wok Nordin J:

Background Facts

[1] This is an unfortunate case of a family who are American-Singaporean expatriates who had intended to set up home in Malaysia *via* the programme known as Malaysia My Second Home also known as MM2H promoted by the Malaysian Tourism Authority and the Immigration Department of Malaysia, to allow foreigners to stay in Malaysia. Through no fault of their own, this family was put through amongst others much hassle and inconvenience as a result of a luxurious condominium they had purchased which they had intended to call their home in Malaysia.

[2] The plaintiffs herein, who are husband and wife had purchased the said luxurious condo which is known as Agile Mont Kiara project ('project') from the defendant, Agile PJD Development Sdn Bhd, who is the developer of the project.

[3] The plaintiffs state that on 27 November 2016, the plaintiffs had allegedly authorised their attorney to remit a deposit payment of RM10,000 *via* cheque to the defendant to secure Unit D-07-01 of the project ('parcel').

[4] Thereafter, the facts show that on 21 December 2016, the plaintiffs made the first payment of RM53,256 and executed a sale and purchase agreement ('SPA') to purchase the parcel for the total purchase price of RM2,662,800.

[5] Under the terms of the SPA, liquidated ascertained damages ('LAD') are payable at 10% of the purchase price, amounting to RM729.54 per day for any delay.

[6] After a wait of four-years being on 24 December 2020, the plaintiffs was informed by the defendant that the defendant was prepared to deliver VP to the plaintiffs, attaching the notice of delivery of vacant possession dated 25 December 2020. This is an agreed fact between the parties.

[7] On 29 December 2020, the plaintiffs responded to the defendant acknowledging receipt of the notice of delivery of vacant possession, and thereafter on 8 January 2021, the plaintiffs further informed the defendant that they had paid the sum of RM508,295.69, as well-paid management fees of RM6,199.06 and deposited the amount of RM133,140 with PW Tan & Associates, the solicitors who prepared the SPA.

[8] Subsequently, the plaintiffs took the keys to the parcel and conducted an inspection of the parcel on 4 February 2021. It was then that the plaintiffs alleged that they discovered that the parcel was full of severe defects rendering it unfit for occupation.

[9] Amongst the defects that were discovered by the plaintiffs were that the parcel exhibited water leakages, structural wall cracks, and incomplete finishes due to poor workmanship and inadequate waterproofing.

[10] As a result of the same, the plaintiffs were unable to move into the parcel on 4 February 2021 and the plaintiffs had submitted the initial defect forms to the defendant, requesting rectification of the defects.

[11] The defendant thereafter carried out rectifications in the parcel as well as over the rooftop of the parcel, including hacking, applying cement, installing the torch membrane and re-flooring to fix the defects on no less than three occasions since the defect recurred. Throughout this period, it is alleged by the plaintiffs that the said parcel remained unfit for occupation due to the ongoing rectification works.

[12] The plaintiffs then state that as time progressed, the plaintiffs continued to file additional defect forms, and rectification works have been ongoing throughout this period, up to the present date.

[13] The plaintiffs then allege that on the belief that the defendant was close to rectifying the defects and to mitigate their losses, the plaintiffs moved into the parcel on 6 November 2021.

[14] The plaintiffs submit that the defects remained unresolved and, in some instances, recurred and that they have continued to experience significant problems, including persistent water leakages and structural cracks, which have further impacted their ability to enjoy the parcel.

[15] The plaintiffs plead that the defendant's promotion of the project as a luxury condominium created a legitimate expectation that the parcel would meet the standards commensurate with such classification.

[16] Thus, the plaintiffs contend that the defendant also ought to have exercised reasonable care and skill in the construction and design of the parcel and ensuring that the contractors execute the works in a good and workman-like manner.

[17] The plaintiffs therefore states that the SPA ought to be interpreted to incorporate the following implied terms:

(i) the parcel will be constructed and completed to a high standard that is commensurate with and/or compatible for a luxury condominium before vacant possession is given;

(ii) the defendant shall ensure that the final result of the parcel accords with the Fourth Schedule of the SPA by using good materials and workmanship in constructing the parcel that is safe and fit to be occupied;

(iii) the defendant shall ensure that the parcel is safe and fit for occupation before applying for and/or obtaining the completion and compliance certificate ('CCC');

(iv) the defendant shall ensure that the parcel is safe and fit to be occupied before handing over the keys for vacant possession of the parcel; and

(v) the defendant shall ensure that the CCC which certified that the parcel is safe and fit for occupation is truly in accordance and/or reflective of the actual condition of the parcel.

The Defence

[18] The defendant has pleaded as its defence amongst others that:

(i) the defendant has delivered VP notice to the plaintiff together with amongst others, CCC certifying that the parcel is safe and fit to be occupied;

(ii) the defendant has duly complied with cl. 27 of the SPA and the plaintiffs acknowledged receipt of the VP notice on 29 December 2020. Therefore, the plaintiffs are deemed to have taken possession of the parcel on or around 29 December 2020;

(iii) the plaintiffs did not, at any material time, challenge the validity of the CCC or the manner of the delivery of the vacant possession;

(iv) in these circumstances, there is no basis for the plaintiffs to seek for a declaration that the vacant possession has not been delivered to the plaintiffs *via* the VP notice and claim for LAD from the period from 27 November 2020 to 6 November 2020;

(v) the plaintiffs are only entitled to claim for five days of delay in delivering the vacant possession from 21 December 2020 until 25 December 2020 amounting to RM3,647.67 (RM729.53 x 5 days) as LAD pursuant to cl. 25(1) of the SPA;

(vi) the plaintiff is only entitled to vacant possession within 48 months from the date of the SPA (*ie*, on or before 21 December 2020), therefore, there is no basis for the plaintiff to claim for special damages from 27 November 2020 to 21 December 2020 for the pre-contractual delivery of vacant possession or for special damages for the period between 22 December 2020 and 29 December 2020 for the contractual delivery of vacant possession until actual delivery of vacant possession as claiming for special damages for this period would amount to an unjust enrichment;

(vii) there is also no basis for the plaintiffs to claim for special damages for rental and furniture storage for the period between 30 December 2020 and 6 November 2021;

(viii) the alleged defects were minor defects and the plaintiffs chose not to move in to the parcel even after they have collected the keys on 4 February 2021; and

(ix) the plaintiffs do not have a cause of action against the defendant under the Strata Management (Maintenance and Management) Regulations 2015 (SMA) in this proceeding and had not pleaded which section of the SMA the defendant has breached.

Court's Analysis And Findings

[19] I will now specify for the ease of convenience the clauses in the SPA which I find will be relevant in determining this court's decision for this matter.

[20] The said clauses in the SPA are as follows:

> Clause 9 - Time of essence of the contract
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> Clause 14 - Materials and workmanship to conform to description
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> 14. (1) The said Parcel together with all the common facilities, which shall form part of the common property, shall be constructed in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule and in accordance with the plans approved by the Appropriate Authority as in the Second Schedule, which descriptions and plans have been accepted and consented by the Purchaser, as the Purchaser hereby acknowledges ...
>
> Clause 23 - Compliance with Written Laws
>
> Clause 25 - Time for delivery of vacant possession
>
> 25. (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 27 within forty-eight (48) months from the date of this Agreement.

Clause 27 – Manner of delivery of vacant possession

27. (1) The Developer shall let the Purchaser into possession of the said Parcel upon the following:

(a) the issuance of a certificate of completion and compliance;

(b) the separate strata title relating to the said Parcel has been issued by the Appropriate Authority;

(c) water and electricity supply are ready for connection to the said Parcel;

(d) the Purchaser having paid all monies payable under subclause 5(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement; and

(e) the completion of any alteration or additional work under subclause 15(2), if any.

(2) The delivery of vacant possession by the Developer shall be supported by a certificate of completion and compliance and includes the handing over of the keys of the Parcel to the Purchaser.

(3) Upon the expiry of thirty (30) days from the date of service of a notice form the Developer requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

Defect liability period

30. (1) Any defect, shrinkage or other faults in the said Parcel or the said Building or the common property which becomes apparent within twenty-four (24) months after the date the Purchaser takes vacant possession of the said Parcel and which are due to defective workmanship or materials or; the said Parcel or the said Building or the said common property not having been constructed in accordance with the plans and descriptions as specified in the First and Fourth Schedules as approved or amended by the Appropriate Authority, shall be repaired and made good by the Developer at its own cost and expense within thirty (30) days of the Developer having received written notice thereof from the Purchaser.

[21] As a matter of law, it is trite that the plaintiffs and the defendant are bound by the express terms contained in the SPA which SPA shall conform to the statutory Schedule H sale and purchase agreement under the Housing and Developers Act ('HDA').

[22] I was, however, referred to and wish to refer to the case of *Dua Residency Management Corporation v. Edisi Utama Sdn Bhd & Anor* [2021] CLJU 174; [2021] 1 LNS 174; [2021] MLJU 140 where His Lordship Lim Chong Fong (now judge of the Court of Appeal) held:

[91] Furthermore, the Plaintiff relied on three-fold implied terms expounded in the 1966 English Court of Appeal case of *Hancock and Others v. B W Brazier (Anerley) Ltd* [1966] 2 All ER 901 (CA), in which the plaintiff, the purchaser of a house built by the defendants, sued for damages for breach of contract in failing to erect and complete the house purchased in a proper and workmanlike manner after the purchaser's house suffered from substantial damage due to the usage of unsuitable materials during its construction. Lord Denning held that apart from the express clauses contained within the contract entered into between the plaintiff and the defendants in the sale and purchase of the house, the defendant builders were also bound by a threefold implication in law:

It is quite clear from *Lawrence v. Cassel* (1) and *Miller v. Cannon Hill Estates, Ltd* (2), that *when a purchaser buys a house from a builder who contracts to build it, there is a threefold implication: that the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation.* Sometimes this implication, or some part of it, may be excluded by an express provision, as for instance in *Lynch v. Thorne* (3). The specification there expressly provided that the walls were to be nine-inch brick walls. The work was done with good materials and workmanship and exactly in accordance with the specification; but the walls did not keep out the driving rain. The builder was held not liable. The question in this case is whether the threefold implication is excluded by cl. 9. I think that it is not, for this simple reason: cl. 9 deals only with workmanship. It does not deal with materials. The quality of materials is left to be implied; and the necessary implication is that they should be good and suitable for the work. I am quite clear that it is implied in the contract that the hardcore must be good and proper hardcore, in the same way as the bricks must be good and proper bricks. I know that the builders were not at fault themselves. Nevertheless, this is a contract: it was their responsibility to see that good and proper hardcore was put in. As it was not put in, they are in breach of their contract. If it is any consolation to them, they can try and get hold of their suppliers and sue them if they can prove it against them; but they have to take responsibility so far as the purchasers are concerned.

This three-fold implied terms principle has been accepted in the Malaysian cases of *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 as well as *Komala Devi M Perumal v. Bandar Eco-Setia Sdn Bhd & Anor* [2016] 1 LNS 1053. (emphasis added)

[23] With respect, after reading the aforesaid case of *Dua Residency Management Corporation* (*supra*) I too do subscribe and hold that the three-fold implied terms principle of as mentioned in the cases above, *ie*, the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation are to be necessarily implied within the SPA entered into between the plaintiffs and the defendant in the sale and purchase of the said parcel.

[24] I am also guided by the case of *Lee Shy Tsong & Ors v. Amprojek Construction Sdn Bhd* [2018] CLJU 2088; [2018] 1 LNS 2088 which had emphasised that implied terms are critical in ensuring the SPA fulfils its statutory intent, particularly in protecting homebuyers as the weaker party in the transaction.

[25] Another case which I wish to quote and which I am persuaded by in coming to my decision is *Hariram a/l Jayaram & Ors v. Sentul Raya Sdn Bhd* [2003] 1 MLJ 22 is that both the Housing Development (Control and Licensing) Act 1966 and Housing Development (Control and Licensing) Regulations 1989 ('HDR') are social legislations designed to protect purchasers. Numerous cases such as *Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v. Keris Properties (PK) Sdn Bhd (No 1)* [2009] 5 MLJ 381, and *Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720; [2020] 6 MLJ 191, both Court of Appeal decisions as well as the Federal Court decisions in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 and *Remeggious Krishnan v. SKS Southern Sdn Bhd* [2023] 4 CLJ 36; [2023] 3 MLJ 1 since then have affirmed this position.

[26] Abdul Malik Ishak J (as His Lordship then was) had in *Hariram Jayaram & Ors* (*supra*) held:

> Likewise here, the sale and purchase agreements made in accordance with Schedule 'H' to the Housing Regulations which were in turn made under the Housing Act must take precedence over the Contracts Act 1950. Being a specific piece of social legislation enacted solely to protect house buyers from unscrupulous developers, the standard sale and purchase agreements signed by the plaintiffs must take precedence over the Contracts Act 1950 and must be given effect accordingly. In the words of Lord Simon of Glaisdale in *Stock v. Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, especially at pp 235-236 of the report:
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> In his argument based on alleged anomaly, counsel for the appellants was founding himself on the rider in what has come to be known as 'Lord Wensleydale's golden rule' of statutory construction – namely, you are to apply statutory words and phrases according to their natural and ordinary meaning without addition or subtraction, unless that meaning produces injustice, absurdity, anomaly or contradiction, in which case you may modify the natural and ordinary meaning so as to obviate such injustice etc but no further. (Nowadays we should add to 'natural and ordinary meaning' the words 'in their context and according to the appropriate linguistic register.') Counsel for the appellants urged your Lordships, as he did the Court of Appeal, to modify the natural and ordinary meaning of the statutory language – in effect, to add words which are not in the statute in order to obviate what he claimed were the absurd and anomalous consequences of taking the words literally.

The rider to 'Lord Wensleydale's golden rule' may seem to be at variance with the citations of high authority contained in the speeches of my noble and learned friends. But this is not really so. The clue to their reconciliation is to be found in the frequently cited passage on statutory construction in Lord Blackburn's speech in *River Wear Commissioners v. Adamson* (1877) 2 App Cas 743, 763:

> In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.

Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law). The first way, says Lord Blackburn, of eliminating legally irrelevant meanings is to look to the statutory objective. This is the well-known canon of construction referred to by my noble and learned friend on the Woolsack which goes by the name of 'the rule in *Heydon*'s case' (1584) 3 Co Rep 7a (Nowadays we speak of the 'purposive' or 'functional' construction of a statute).

It is axiomatic that in interpreting the specific piece of social legislation at hand, an interpretation must be arrived at so as to advance the object and purpose of the Housing Act. Full effect must therefore be accorded to the avowed social objective of the Housing Act …

[27] That being said, this court will now have to determine whether the defendant had breached the express terms of the SPA as well as the three-fold implied terms principle mentioned above.

Defects

[28] Accordingly, I will firstly deal with the aspects of the alleged defects in the parcel. At the trial, the plaintiffs' expert witness has summarised the primary defects of the parcel in his expert report, as detailed on pp. 743 to 774 of bundle F, and categorised as defect Forms 1 to 6. The same defects were also addressed in the defendant's expert report on pp. 1112 to 1169 of bundle H.

[29] In essence, the plaintiffs' expert witness, Mr Kuan You Wai (SP1) had concluded that there were:

(i) leaking spots with a high level of dampness due to water seepage from the rooftop which originated from premature waterproofing failure from the modified bitumen membranes;

(ii) that there are cracks on the external wall in bedroom 2 caused by the temperature induced size change of the flat roof which has also contributed to the cracked tiles in the toilet in bedroom 2; and

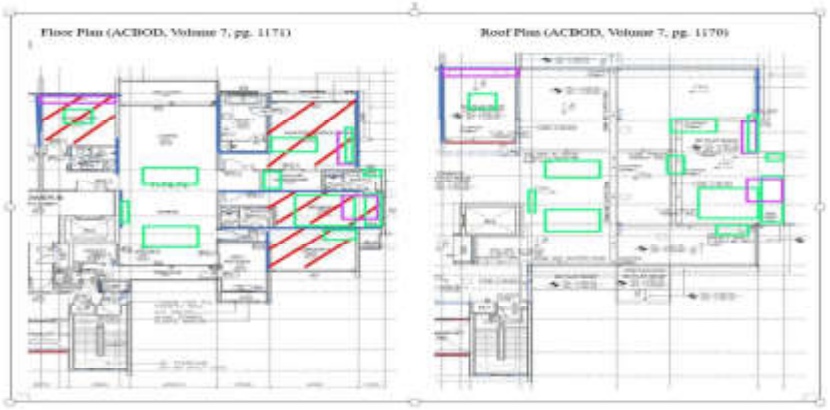
(iii) dampness on the floor of bedroom 4 which is caused by water seepage through the cavities from the window and external wall.

[30] In cross-examination SP1 had also testified:

Cross Examination of PW1 on pg 40, line 29-30, NOP Jilid 1, Enc 85

SP1 Ya let's say this is 1 piece of flat roof, if water manage to seep from the water proofing cavities, I mean when it goes down to the membrane, water proofing membrane then there will be 1 layer of water pocket. Under the hot sun without rain, after the whole day of hot sunshine okay the water pocket will become heated together with the dry concreate so in the evening when heat start to dissipate because water can retain heat longer so ASTM C1153 require me to inspect the roof at 8pm to check for the hotspot. So, after I check the hotspot, which is represented by the yellow colour, I used this moisture meter which can penetrate 20mm from the surface to confirm the water pocket. This is the way we check and derive to this conclusion the whole roof has a lot of water pocket.

[31] The following is the floor plan highlighting the defects across the roof, walls, and floors of the parcel, as annexed in Annexure A of the plaintiff's written submissions.



Symbol	Description (Defects)	References
	Water leakages at the ceiling	1. Defect Forms No.: 1, 6, 7, 14, 15, 20, 22, 23, 25, 26, 28, 32, 33, 35, 36, 33, 34, 39 and 43. 2. CBOD: pg. 76 – 78, 799, 80, 81, 82, 87, 88, 90 and 95. 3. ACBOD Vol. ": 3, 4, 11, 13, 14 and 15
	Water leakages into floor slab	
	Walls cracks	1. Defect Forms No.: 2,, 5, 6, 26 and 9 2. SP1's Expert Report 3. SD4's Expert Report 4. Canaan Report
	Floor Defects	1. Defect Forms No.: 2,, 5, 6, 26 and 27 2. SP1's Expert Report

[32] For the record, I had made a site visit to the parcel on 30 January 2024 and found that the defects as listed above still persisted on the day of the visit and I had observed that the dampness was sufficiently visible to the naked eye and was, in my opinion, sufficiently serious so as to cause the plaintiffs to be in a position to wit the parcel was in my opinion uninhabitable and, more so when the said parcel is supposed to be a high-end condominium.

[33] This observation of the dampness being sufficiently visible to the naked eye was also affirmed by SD4 in the hot tubbing session, SD4 stated:

> **Hot Tubbing on pg. 939, line 9-14, NOP Jilid 3, Enc 87**
>
> YY: Here in the expert report I do not see any instrument used, perhaps can you explain why you do not use this method in checking the dampness?
>
> Lim: I think the **dampness is quite obvious. Is damp, we didn't deny that.** Just that the subsequent one normally as an architect we ask for expert help for further thorough check. Yeah (emphasis added)

[34] I must also state that the defendant's expert, Ar Lim Wei Liang (SD4) did not deny the existence of defects in the plaintiffs' parcel but primarily disagreed with the plaintiffs' expert on the causes of these defects.

[35] From the trial I have found that the defendant's expert, SD4, had admitted to the various defects in the parcel within his expert report, oral testimony and hot tubbing session.

[36] Based on the defendant's expert, SP4 there is a high level of dampness on the soffit to which SP4 testified that the possible causes of the water seepage include unsealed openings in the side drainage, gaps around the trunking, as well as cracks, holes, and cavities on the upper part of the external wall. To this SD4 had, under cross-examination, also concurred with PW1's opinion that the water seepage was caused by failure of the waterproofing system.

[37] I have also observed that at the trial, both experts share a common and similar opinion that the rectification should be carried out by re-waterproofing with single-ply membranes.

[38] I have also concluded based on SP1's opinion, which was not disputed by SD4, that the water seepage on the rooftop has resulted in the formation of water pockets, and that the leakage path originates approximately three metres from the location of these water pockets. To this I concur with the plaintiff's learned counsel that this constitutes an abnormality.

[39] Coming to the ceiling defect in bedroom 2, I find that both experts, *ie*, SP1 and SD4 had attributed the leakages and seepages to defects on the roof as can be found in the Scott Schedule at encl. 83, pp. 4 to 5.

[40] On the findings with regards bedroom 2 internal wall, I find both experts had disagreed on how the cracks in the external wall were caused.

[41] As to the toilet bedroom 2 wall, both experts had also disagreed on how the cracks in the wall tiles were caused, but both experts did all however, concur that the appropriate rectification involves replacing the tiles and installing suitable movement joints.

[42] With respect to the floor defect in bedroom 4, as outlined in defect sheet 6, both experts state that the defect was generally attributed to cracks in the external wall and issues with the roof and that the appropriate remedy is to repair and seal the affected areas.

[43] All in, after examining the totality of the evidence before me, I do find and conclude that the defects identified, in particular that water leakage constitutes a significant defect within the parcel are in my mind severe and significant, and demonstrates the defendant's failure to construct the parcel in a good and workman-like manner as required under cl. 14 of the SPA.

[44] I also find from the evidence before me, that there have been recurring water leakages over multiple times due to an interconnected chain of issues. It is for this reason, that these water leakages rendered it impossible for the defendant to complete the rectification works within a period of 30 days. I would for this purpose refer to Chee Tze Lic, the Senior Project Manager who is SD3, where in his testimony under cross-examination corroborates my said findings where SD 3 testified:

Cross Examination of DW3 on pg. 861, line 31-35, NOP Jilid 3, Enc 87

SP And I also put to you that the Defendant cannot complete the rectification works within the 30 days **because the defects here in the email are major defect. Do you agree?**

SD3 **Yes.** (emphasis added)

The Wall Cracks

[45] I now turn to the wall cracks which I find from the trial were admitted to by the defendant as existing even before the delivery of the keys. This can be seen from the testimony of Chow Tet Fah @ Chu Tet Fah (SD1), the Civil and Structural Engineer for the project under re-examination at trial where SD1 testified:

Re Examination of SD1 on pg. 659, line 12-19, NOP Jilid 2, Enc 86

PW: So pre Covid and you disagree. Can you tell the Court why do you disagree?

SD1: Yes. The last time they were asked, certainly I did, I can't recollect the exact date because I went to this unit several times. Yes, pre Covid. **I also inspected before this tenant moved in because they, some problem with the cracks.** I went visited before then. But specifically, I think for this, this closet inspection where I see the, the leak inside the closet, that was December 22nd. Actually, I make a report on how to rectify that, that that defect as well after that. (emphasis added)

[46] Corroboration on SD1's said testimony can be found in the evidence provided by SP1, the plaintiffs' witnesses:

Cross Examination of SP1 on pg. 234, line 18-30, NOP Jilid 1, Enc 85

PW: So how would you know it must be these issues without doing coring and also openings cavities.

SP1: There are many possible causes but some of the causes can be identified easily with naked eye and among the easy one which I think the architect has also put in his report, his first rebuttal to my report, that the open cavities are among some of the reason why waterproof failed. That's why I always refer to waterproofing system, which encompassed, you know, the ceiling of the opening, the flashing, all type of thing but in this case, something very simple has even been overlooked by the rectification team and it is a **very obvious poor workmanship issue.** It has been done earlier, not during my inspection. And my **inspection was after the leaking has persisted for a number of years, and that is unacceptable.** (emphasis added)

[47] I am of the view after careful consideration that this admission demonstrates that the defects were pre-existing and inherent and that the parcel was not constructed using good materials nor in a workman-like manner, as expressly required under the terms of the SPA.

[48] It is therefore my decision that there is a breach of the express terms in cl. 14 of the SPA with regard to the materials and workmanship to the said parcel and/or that the parcel was not constructed in a good and workmanlike manner and/or the implied terms that the defendant/developer has failed to

A do its work in a good and workman-like manner and/or that it will supply good and proper materials; and that the parcel will be reasonably fit for human habitation.

When Was Vacant Possession Delivered

B **[49]** I now turn to the issue of when vacant possession for the parcel was delivered to the plaintiffs. Under cl. 25(1) of the SPA, vacant possession of the parcel shall be delivered to the defendant within 48 calendar months from the date of the SPA in the manner specified and pursuant to cl. 27(1) of the SPA, the delivery of vacant possession by the defendant shall, *inter alia*, be supported by a completion and compliance certificate certifying that the parcel is safe and fit to be occupied.

[50] From the evidence before me, the defendant had issued a VP notice by way of the notice of delivery of vacant possession dated 25 December 2020 to the plaintiff together with amongst others, the CCC dated 31 December 2019 certifying that the parcel is safe and fit to be occupied. In the notice of delivery of vacant possession, it was expressly stated therein that VP would be deemed to have been given 30 days from the date specified in the said notice of delivery of vacant possession "… whether or not you have entered into possession or occupation of the abovesaid property … pursuant to cl. 27 of the SPA".

[51] I also find that the plaintiffs had subsequently acknowledged receipt of the VP notice/notice of delivery of vacant possession on 29 December 2020.

[52] In this respect, this court has taken notice that the plaintiffs thereafter only collected the keys from the defendant on 4 February 2021 and inspected the parcel on the same day, after which the plaintiffs immediately lodged a defect checklist with regards numerous defects to the defendant and a further defect checklist dated 15 February 2021 for other defects was then also given to the defendant.

[53] It is consequently, therefore, my decision that the plaintiffs are deemed to have taken possession of the parcel on or around 29 December 2020.

[54] The plaintiff had in the matter before me sought to argue before this court that the SPA is tainted by irregularity, as it does not conform to the mandatory 36-month period for the delivery of vacant possession as per reg. 11(1) of the HDR which states that any contract of sale of any housing accommodation in a subdivided building by housing developers must conform with the form prescribed in Schedule H of the regulations. Accordingly, the plaintiffs submit that the supposed date for vacant possession, in compliance with the law, should be on or before 27 November 2019.

[55] From the evidence before me, there is a letter dated 30 September 2015 from the Jabatan Perumahan Negara which was signed by one, Nor Azmi bin Mohamad on behalf of the controller of housing whereby an extension of time was purportedly granted by the housing controller in accordance with reg. 11(3) of the HDR for an extension of time for delivery of vacant possession from 36 months to 48 months.

[56] In *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162, our apex court had held that:

> [59] The powers and duties of the Minister, the Controller and an Inspector, respectively, had thus been clearly defined. It is also pertinent to highlight, that by s. 4(2), express provisions were made for the exercise of an Inspector's powers by the Controller. By sub-ss. (3) and (4) of s. 4, Parliament had expressly allowed for the delegation of the Controller's powers to named persons. But there is no such provision enabling the Controller to exercise the Minister's powers. This supports our view that Parliament did not intend for the Minister's powers to regulate the terms and conditions of a contract of sale to be delegated to the Controller.
>
> [60] On the above analysis, we hold that the Controller has no power to waive or modify any provision in the Schedule H Contract of Sale because s. 24 of the Act does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H Contract of Sale to the Controller. And it is not open to us to read into the section an implied power enabling the Minister to do so. We consequently hold that reg. 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is *ultra vires* the Act.

[57] However, based on *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals* [2024] 8 CLJ 519; [2024] MLJU 1902, a later decision of the Federal Court has held that the decision in *Ang Ming Lee & Ors* (*supra*) is to be ruled prospective as it is now been held:

> [134] We agree with the submission of learned counsels for the Appellants that despite the extension having been declared unlawful and invalid by *Ang Ming Lee*, it should not adversely affect the parties who had relied on that decision or regulation prior to the declaration of invalidity. *Ang Ming Lee* can be described as a placebo to cure the ills that ail the extension granted. However, in this case it is necessary to have a specific antidote to eradicate any negative side effects of *Ang Ming Lee*. What is the antidote that this Court will prescribe? On the authorities we have discussed, where an innocent party had relied on an earlier decision made by a public authority that was subsequently declared *ultra vires*, the Second Actor Theory is applicable and should be the perfect and preferred antidote.

A [135] The developer, in this case Sri Damansara, relied upon the act of granting the extension. There would be substantial injustice if the act of developer is found to be void because of the invalidity of the first act by the Controller. As the 2nd and 3rd Respondents did not challenge the validity of the EOT approved by the Controller before the Tribunal, nor did they mount any challenge it in the judicial review proceedings, they
B cannot therefore initiate a collateral proceeding. The extended period was granted before the SPA was executed and both the Respondents were fully aware of the time of completion. Hence, the 2nd and 3rd Respondents for the reasons we have alluded are not in the position to initiate a collateral proceeding against Sri Damansara.

C [136] The Controller had considered the application for extension and granted the extension as the law at that time was valid. The developer had relied on the decision of the Controller who had granted the extension. Accordingly, we have no difficulty in holding that the Second Actor Theory applies. The question posed is therefore answered in the affirmative.

D …

[160] In *Ang Ming Lee* this Court declared that Regulation 11 (3) HDR *ultra vires* the HDA, and thus, the extension granted by the Controller was invalid. *Ang Ming Lee*, however, is silent as to whether the effect of declaring Regulation 11(3) HDR *ultra vires* would apply retrospectively or
E prospectively. This means that any extension granted by the Controller would be invalid prior to *Ang Ming Lee* and house buyers would be entitled to LAD to be calculated up to *Ang Ming Lee* notwithstanding the fact that they may have been paid LAD and vacant possession have been delivered. This cannot be so, as it will result in substantive injustice as it will impair the rights of the parties involved. At the time the extension
F was granted the law, that is Regulation 11(3) HDR was valid and reliance was placed based not only on the statutory regime at that time allowing such extension to be granted and extending the prescribed 36 months completion period but also the terms of the executed SPAs were based on the approved extension as required by the law.

G [161] Learned Counsels for Obata and Vignesh, Dato KL Wong and Dato Low Joo Hean submitted at length that the Courts' role is only to interpret the law and as such may not be permitted to impose prospective effect of any ruling akin to legislative's act of making law and in any event, they are not permitted to violate the equal protection principle that transcends adjudicative jurisprudence in all the common law courts. The
H prospective overruling referred to in the various authorities are pronouncements which are consistent with retrospective effect of the decisions. Therefore, since these appeals had been filed after *Ang Ming Lee* was decided, there is no infringement of the doctrine even if the principle is applied herein.

I

[58] Thus, premised on *Obata-Ambak Holdings Sdn Bhd* (*supra*), I agree with learned counsel for the defendants that the extension of time to the said 48 months period granted by the controller in these cases both valid and legal as the controller had, at that material time, the authority to waive or amend the terms of the Schedule H SPA.

[59] I thus hold that the delivery of vacant possession in the case before this court is the period of 48 months.

[60] For the record, I have also considered whether the pleadings as alleged by the defendant did not encompass the cause of action as submitted by the plaintiffs *vis-à-vis* the LAD period and the special damages issues but I find after reading the statement of claim *in toto* that these issues were in fact pleaded by the plaintiffs.

[61] I now turn to the issue which the plaintiffs had submitted that the date of entry into the SPA, would on the law as expounded in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60, be the date on which the initial fee was paid, which is the 27 November 2016, as can be seen *via* Citibank Cheque No. 958061 issued by the plaintiffs to the defendant and the acknowledgement of receipt issued by the defendant to the plaintiffs on the same day.

[62] I have after perusing the evidence and the notes of proceedings observed that initially only PW2 was stated or specified to be the purchaser for the parcel but this was subsequently changed to include PW1 and the defendant thereafter returned the said Citibank Cheque No. 958061 to PW2.

[63] Thereafter, it is my findings that the deposit of RM53,256 which forms part of the first 10% was only paid on 16 December 2016 which is evidenced by the temporary receipt issued which can be found at p. 1 of bundle B and two other receipts found at p. 3 of the same bundle all dated 2 December 2016.

[64] On the aforesaid pieces of evidence, it is my finding that the date of entry into the SPA is not the 27 November 2016 as alleged by the plaintiff but is in fact the 2 December 2016 and that the initial contract between PW2 and the defendant was cancelled and replaced by the contract entered into by both the purchasers and the defendant on 2 December 2016.

[65] As I have held that the SPA validly contains a period of 48 months for delivery of vacant possession, it is in the matter before me the duty of the defendant to deliver vacant possession on or before 1 December 2020, *ie*, a total of 48 months from 2 December 2016 which is the date of the entry into the SPA , which I have indicated earlier is premised on when the deposit of RM53,256 was only paid and is evidenced by the temporary receipt issued dated 2 December 2016.

[66] In this aspect, the plaintiff had submitted that the delivery of vacant possession should only occur once the parcel is safe and fit for occupation due to the significant defects affecting the parcel, and as such legal vacant possession should not be deemed to have been delivered by the defendant until these defects are remedied in full.

[67] With respect, I hold that such an argument does not hold water here as the plaintiffs had acknowledged the notice of delivery of vacant possession and there is nothing before me to show that they had reserved their rights to claim otherwise.

[68] In my view, even cl. 27 does not support this contention of the plaintiffs that legal vacant possession should not be deemed to have been delivered by the defendant until these defects are remedied in full as cl. 27 only states that the developer shall let the purchaser into possession of the said parcel upon the following:

(a) the issuance of a certificate of completion and compliance;

(b) the separate strata title relating to the said Parcel has been issued by the Appropriate Authority;

(c) water and electricity supply are ready for connection to the said Parcel;

(d) the Purchaser having paid all monies payable under subclause 5(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement; and

(e) the completion of any alteration or additional work under subclause 15(2), if any.

[69] Whereas CCC is defined pursuant to cl. 1(c) of the SPA as follows:

> "certificate of completion and compliance" means the certificate of completion and compliance given or granted under the Street, Drainage and Building Act 1974 [Act 133] and any by-laws made under the Act certifying that the housing accommodation has been completed and is safe and fit for occupation but does not include partial completion of completion and compliance.

[70] It is clear in the case before me that the certificate of completion and compliance ('CCC') had been issued on 31 December 2019 as per p. 58 of bundle B and that the CCC had accompanied the said notice of delivery of vacant possession. There is no denial of the CCC being issued or a challenge by the plaintiffs to the said CCC in the plaintiffs' pleadings.

[71] I have considered the respective parties' submissions on whether the parcel was fit for occupation at the time of delivery of vacant possession and based on my careful observation of the evidence of the defect checklist dated 4 February 2021 and 15 February 2021, I find the alleged defects at the material time were mostly minor in nature.

[72] Accordingly, I hold that the evidence of the state of the parcel at the time of delivery of vacant possession, *ie*, 29 December 2020 has not been proven to the satisfaction of this court to be unfit and unsafe for occupation.

[73] I, therefore, hold that the defendant has duly complied with cl. 27 of the SPA and at the risk of repetition, the plaintiffs have acknowledged receipt of the VP notice on 29 December 2020. Therefore, the plaintiffs are deemed to have taken possession of the parcel on or around 29 December 2020.

Implied Terms

[74] As mentioned in my grounds above, the defendant has, however, a duty to comply with the three-fold implied test as referred to in the *Dua Residency Management Corporation* (*supra*) case which was based on the English case of *Hancock and Others* which requires the defendant as a developer/ builder to do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation are to be necessarily implied within the SPA.

[75] On my evaluation of the totality of the evidence before me, I do, however, find that the parcel has numerous defects, including, but not limited to dampness, water leaks, water ingress, a waterproofing system which has failed, wall cracks, flooring issues, and incomplete finishing work which has to-date yet to be remedied properly and subsequent rectification works undertaken by the defendant, rendering the parcel uninhabitable.

[76] I agree with learned counsel for the plaintiff that this underscores a fundamental failure in the quality of materials and workmanship and the maxim of '*res ipsa loquitor*' will apply in such a case.

[77] I thus do hold from the facts before me that the defendant has failed to comply with the implied terms as mentioned above, including but not limited to the obligation and a duty to construct the parcel to a standard befitting and expected of a luxury condominium that is functionally consistent with such a standard.

[78] This, in my view, also imposes a duty of care on the defendant as a developer to ensure that the damages suffered by the plaintiffs as house buyers are avoided. Such damages would not have occured to the plaintiffs if proper care had been taken, and the plaintiffs would then not be placed in the position that they have had to endure.

Delays In Addressing Defects

[79] I have in addressing the issue of the rectification of the defects considered cl. 30(1) of the SPA which provides for defect rectification of any defect, shrinkage or other faults in the said parcel or the said building which becomes apparent within twenty-four (24) months after the date the purchaser takes vacant possession of the said parcel and which are due to

defective workmanship or materials or; the said parcel or the said building or the said common property not having been constructed in accordance with the plans and descriptions as specified in the First and Fourth Schedules shall be repaired and made good by the developer at its own cost and expense within 30 days of the developer having received written notice thereof from the purchaser.

[80] I have also noted that the defendant has:

(i) attempted to rectify the defects, including re-doing, hacking, removing and replacing the affected components;

(ii) replaced the wooden floor up to four times; and

(iii) hacked and opened up the rooftop to look for the source to rectify the water seepage issue defects and add an additional water proofing layer (*ie*, the APP Bitumen Waterproofing membrane) as a protective measure.

[81] Be that as it may, it is also my judgment, from the facts before me, that there have been some delays in addressing the defects which were without valid justification and that these delays have aggravated or exacerbated the damages to the parcel. In the cross examination of SD3, Chee Tze Lic, the defendant's senior project manager, the said SD3 had agreed to the suggestion by the plaintiffs' counsel that there has been "… very long delays to fix the water leakages" and that "because the defendant delayed in the rectification works, it has caused further damage to the unit".

[82] It is therefore my conclusion that the defendant had negligently failed to carry out the rectification works properly and/or diligently. I say this as the defendant's own witness testimony, had stated that it is standard practice to engage qualified experts to conduct thorough inspections using specialised equipment and instruments to identify water leakages not visible to the naked eye, but this was not done.

[83] In cross-examination of SD4, Ar Lim Wei Liang had testified:

Cross Examination of DW4 on pg. 986-987, line 27-12, NOP Jilid 3, Enc 87

YY: At page 753, Mr. Kwan has referred to ASTM-C1153, which is according to Mr Kuan, it's American standard for testing and material. And this document can be found at the page 799 of the same bundle, F, 799. Yes. This is the standard practice for location of wet insulation in roofing systems using infrared imaging. According to Mr. Kuan, this is the accepted standards to be used to detect water pockets. Can I understand from you, why is there, why did you not use this method to conduct a test on the rooftop?

SD4: As a professional normally we won't do testing by our self, we will call for expert help like Mr. Kwan. So because they have specialists, so we are not, so we need specialist to give us some data to finding so that we can analyse.

YY: I see. So, it's not that you don't do, but you haven't actually engaged an expert.

SD4: No.

[84] Thus, it is clear from the evidence that the defendant had failed to follow the standard practice carrying out the rectification works properly and/or diligently.

Alleged Breach Of The Strata Management (Maintenance And Management) Regulations 2015

[85] For the record, I must state that the plaintiffs has pleaded in para. 30 of the amended reply to defence in encl. 41 that the defendant has breached the Strata Management (Maintenance and Management) Regulations 2015 ('SMA') in failing to do amongst others carry out an inspection on the parcel to determine the cause of the water leakages during the defendant's management period.

[86] I am, however, unable to consider the aforesaid argument as I agree with the defendant that the plaintiffs did not plead which section of the SMA the defendant has breached and that the plaintiffs cause of action in its amended statement of claim is not due to breach of the SMA but is based on contract and the tort of negligence.

Damages

[87] I have already in my grounds herein above given my grounds and held that there has been a slight delay in the delivery of vacant possession and as such the plaintiffs, claim for LAD will be allowed by this court.

[88] The defendant submits that the plaintiffs are only entitled to claim for five days of delay in delivering the vacant possession from 21 December 2020 until 25 December 2020 amounting to RM3,647.67 (RM729.53 x 5 days) as LAD pursuant to cl. 25(1) of the SPA. From my findings aforesaid, this time period should in my considered view be from 1 December 2020 to 29 December 2020 (*ie*, RM729.53 x 28 days) which amounts to RM20,426.84 which is to be awarded to the plaintiff as LAD.

Special Damages

[89] I have as indicated above decided and held that there has been a breach of contract and/or breach of duty to care to ensure that the parcel was constructed in a good and workman-like manner as well as a breach of the duty to supply good and proper materials; and that the parcel will be reasonably fit for human habitation.

[90] Section 74(1) of the Contracts Act 1950 provides:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

[91] Accordingly, I will grant the plaintiffs' claim for special damages as prayed for under prayer (b) of para. 37 in the amended statement of claim which consisted of the following:

(a) Rental charges for Accommodation (RM10,800.00 calculated from 19.07.2020 until 06.11.2021 (the date when the Plaintiffs moved into the Parcel) totalling 475 days as per pages 542-585 of Bundle E for the Hotel Accommodation Invoices between 19.07.2020 to 10.11.2021	**RM171,000.00**
(b) Storage fee for belongings (RMB1,500.00/ month) calculated from 01.08.2020 until 13.10.2021 for 438 days as per page 207 Bundle B for the Receipt from Asian Transline Relocation Co. Ltd	**RM14,454.00** (equivalent to RMB21,900 at prevailing rate of 1 RMB:RM 0.66 as at 01.12.2021)
(c) Electricity cost used in rectification works of the Parcel (calculated from September 2021 to December 2021 for 4 months as per pages 538-541 Bundle E for the Electricity Bills from Tenaga Nasional Berhad for the said period	**RM4,084.15**
Total:	**RM189,538.15**

[92] I will, however, not make the order that this sum is to be paid within 14 days from the date of judgment as prayed for.

General Damages

[93] As the plaintiffs have also pleaded in their amended statement of claim for general damages, I will grant the plaintiffs general damages "… which the law presumes to flow from, and as it would be the natural and probable consequence of the defendants' act. Therefore, general damages need not be pleaded specifically nor need any evidence be produced to prove them as such." as per the Court of Appeal in *MGG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals* [1995] 2 CLJ 912; [1995] 2 MLJ 493."

[94] In coming to my decision on the general damages which this court is to grant, I have taken due consideration of the following:

(i) SP3's evidence that the condition of the parcel has filled her life with stress and anxiety which prevented her from enjoying her time here in Malaysia, a country that she considers her second home;

(ii) SP4's evidence of major disruption to his life due to the interruptions by the defendant's workers in performing rectification works, having to worry about resurfacing of the defects, constantly moving in and out of the parcel, constantly shifting furniture and belongings between rooms, being exposed to disruptive noises, dusts, dirt, chemicals and mould, and even suffering from eye irritations which compelled them to acquire air filters and air dehumidifiers to relieve the issue; and

(iii) SP4's further testimony of the negative impact of the water leakage issues on his daughter, such as the frequent headache experienced by his daughter due to the growth of mould, the deterioration of her social life and his daughter's grievance that "she often quotes that she lives in a "storage room" with the exposed hanging rack and clothes packed in boxes in her room".

[95] I am very minded that the plaintiffs' family had to move from one room to another during the rectification process which leads me to find that the plaintiffs have been deprived of enjoying the entire property at all material times.

[96] In the circumstances, I am granting a sum of RM200,000 as general damages pursuant to prayer (d) under para. 37 of the amended statement of claim for the inconvenience, mental grievance, distress and discomfort suffered by the plaintiffs, although I am fully aware that these items cannot be fairly measured.

Aggravated Damages

[97] I have decided not to grant any aggravated damages after taking into account the principle of aggravated damages as per *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] MLJU 377; [2021] MLJU 380; [2021] 3 MLJ 365 where the Federal Court held quoting:

> *McGregor on Damages* (19th Ed) at p 1653:
>
> Aggravated damages come into the picture where the injury to the claimant's feelings is increased by the flagrancy, malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour.

[98] On the facts of this case I hold that aggravated damages are not applicable in compensating the plaintiffs.

A *Exemplary Damages*

[99] I am, however, prepared to award exemplary damages to the plaintiffs as I find the defendant's conduct in this matter to be rather lackadaisical and not in conformity with the standards required in its construction of the parcel and rectification of the defects which tends to lead me to the conclusion that
B the defendant's conduct was driven and calculated by them to make a profit for themselves without considering the effects of their actions in ensuring that the parcel was constructed in a good and workmanlike manner and that they had a duty to supply good and proper materials the project parcel and/or parcel as well as to ensure that the parcel will be reasonably fit for human
C habitation.

[100] In *Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors* [2019] 2 CLJ 261; [2018] MLJU 1025, the Court of Appeal explained exemplary damages as follows:

D [49] The concept of exemplary damages has been explained by this Court in *Sambaga Valli a/p K R Ponnusamy v. Datuk Bandar Kuala Lumpur and Ors, and another appeal* [2018] 1 MLJ 784 -

> [33] The exemplary damages or punitive damages – the two terms now regarded as interchangeable – are additional damages awarded with reference to the conduct of the defendant, to signify
E disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a "contumelious disregard" for the right to the plaintiff. The primary purpose of an award of
F exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff. (See *Rookes v. Barnard* [1964] 1 All ER 347; *AB v. Southwest Water Services* [1993] All ER 609 *Broome v. Cassell & Co* [1971] 2 QB 354, *Laksamana Realty Sdn. Bhd. v. Goh Eng Hwa and Another Appeal* [2005] 4 CLJ 871; [2006] 1 MLJ 675.

G [50] There are two categories provided in the case of *Rookes v. Barnard* (*supra*), for claim of exemplary damages –

> … The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category – I say this with particular reference to the facts of this
H case – to oppressive action by private corporations or individuals. Cases in second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff …

I

[101] I, therefore, award the sum of RM100,000 as exemplary damages to the plaintiffs which will come under prayer (e) of para. 37 in the amended statement of claim.

Miscellaneous Reliefs

[102] I now turn to the other reliefs prayed for by the plaintiffs in particular the letter of guarantee and indemnity to rectify the defects within a reasonable time.

[103] After due consideration of the above prayer, this court will order that the defendant issue within 14 days from the date of this judgment, a letter of guarantee and indemnity to rectify the defects within a period of not more than six months from the date of this judgment and to indemnify the plaintiffs for any losses which would be incurred by the plaintiffs in respect of the same, including but not limited to rental of any premises up to no more than the previous rental rates as shown to this court and upon production of original receipts from the plaintiffs to the defendant.

[104] I will also award costs as per prayer (g) under para. 37 of the amended statement of claim on a solicitor's indemnity basis.

[105] The court will also award interest as per prayer (h) of the amended statement of claim.